SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1966**

No. 944

NATIONAL PNEUMATIC COMPANY, CHARLES FROST, As Agent for Transferees of NATIONAL PNEUMATIC COMPANY and CHARLES FROST, Individually,

*Petitioners,*

*v.*

THE UNITED STATES OF AMERICA,

*Defendant.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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# INDEX


| | PAGE |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statutes Involved | 3 |
| Statement | 3 |
| Reasons for Granting the Writ | 5 |
| Conclusion | 10 |
| Appendix A (Opinion and Judgment of the Court of Claims and Findings of Fact) | 1a |
| Appendix B (Statutes Involved) | 1b |


## AUTHORITIES CITED

**Cases:**


| | |
|---|---|
| *Ashton*, 28 B.T.A. 582 | 5 |
| *Doyle* v. *Levy*, 3 A.D. 2d 908 | 8 |
| *Gould* v. *Gould*, 245 U. S. 151 | 10 |
| *Hazell* v. *City of Long Beach*, 257 N. Y. 201 | 9 |
| *Ledyard* v. *Bull*, 119 N. Y. 62 | 8 |
| *Lewyt Corp.* v. *Commissioner*, 349 U. S. 237 | 7 |
| *Lowy* v. *Commissioner*, 35 T.C. 393 | 7 |
| *MacIntyre* v. *State Bank of Albany*, 307 N. Y. 630 | 8 |

PAGE

*Olympic Radio & Television, Inc.* v. *United States*, 349 U. S. 232 ..... 7

*Patterson* v. *Sims*, 281 F. 2d 577 ..... 7

*Stein* v. *Commissioner*, 37 T.C. 945 ..... 7

*Stern, Commissioner*, v., 357 U. S. 39 ..... 7

*Sweeney* v. *City of New York*, 173 N. Y. 414 ..... 9

*Temoyan, Annie, et al., Trustees*, 16 B.T.A. 923 ..... 5

*Vogelstein*, 16 B.T.A. 947 ..... 5

*Voss* v. *Wiseman*, 234 F. 2d 237 ..... 7

*Yagoda*, 39 T.C. 170 ..... 5

**Statutes:**

Internal Revenue Code of 1939:

Section 311

Debtor and Creditor Law of the State of New York

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

### Opinion Below

The opinion of the Court of Claims is reported at Appendix A, *infra,* pp. 1 to 7a.

### Jurisdiction

The opinion of the Court of Claims was entered on July 15, 1966 along with its Findings of Fact (App. A. *infra,* pp. 7a to 24a) and petition for motion for rehearing was denied on October 14, 1966. The jurisdiction of this Court is invoked under section 28 U.S.C. §1255(1).

## Questions Presented

I. Whether the Court of Claims using "hindsight" (its word) justly determined that the petitioners, in a transferee proceeding, received assets of a value of $61,103.27 in excess of the liabilities with which they were burdened in disregard of the stipulated findings that the liabilities greatly exceeded the assets at the time of the transfer and, based on the excess which the Court determined, approved the extraordinary interest assessment against the transferees of $731,500.46 in this case sought to be refunded.

II. Whether the Court was justified in approving the assessment and collection of the aforesaid amount of interest computed from the years 1945 and 1946, long antedating the time the transferor's tax liabilities could be, and were, determined, due to a conflict of opinion between the Second Circuit Court of Appeals and the Court of Claims, which conflict was not resolved by this Court until 1955.

III. Whether the Court below erred in not following this Court's decision announced in 1958 that the existence and extent of liability of transferees under the section of the law governing this case should be determined by state law.

IV. Whether the Court below erred in approving the assessment of interest including delinquent interest disregarding the stipulations of the parties settling the case which provided that petitioners were subject to the tax liabilities agreed to "plus statutory interest thereon."

## Statutes Involved

The pertinent portions of the Internal Revenue Code of 1939 are set out in Appendix B, *infra*, p. 1b.

## Statement

### I

This suit seeks the refunding of interest amounting to $731,500.46 assessed and collected from the petitioners for the years 1944 and 1945 upon the determination in 1957 of the Federal income and excess profits tax liabilities for these two years of National Pneumatic Company (hereinafter taxpayer). Taxpayer was dissolved in 1949 and the assessed tax and interest liabilities devolved upon the transferees who received all the assets of the taxpayer subject to liabilities which greatly exceeded the assets and was so stipulated and found. The Court of Claims by using "hindsight" held that the assets received exceeded the liabilities by $61,103.27.

The Court of Claims in arriving at this excess made changes in the asset side of the final balance sheet of the taxpayer as prepared by its accounting firm. However, it failed to do the same for the liability side. Thus, the renegotiation liabilities shown thereon as $1,234,829.48 actually amounted to $1,491,927.27 as stipulated and found (Finding 9). The difference between these two figures is $257,097.79, much greater than the margin of $61,103.27, upon which difference the Court below held the petitioners liable to the extraordinary amount of $731,500.46 interest involved in this case.

## II

Due to a conflict of opinion between the Second Circuit Court of Appeals and the Court of Claims, it was not possible for the Government to determine the tax liabilities of the transferees for the two years herein involved until the conflict was resolved by this Court in 1955. The inability to do so was stipulated by the parties.

## III

In 1958 this Court decided that Federal decisional law would be inappropriate in transferee cases under the section of the law ruling this case holding that the existence and extent of their tax liabilities are to be determined by state law. In the present case, it is the law of the State of New York. The Court of Claims continued to rely on its determination that the assets received by the petitioners exceeded the liabilities and therefore Federal decisional law controlled.

## IV

Negotiations leading to the settlement of the case followed the resolution by this Court of the conflict of opinion between the Court of Claims and the Second Circuit Court of Appeals involving the interpretation of a tax statute necessary in determining the liability of the taxpayer. Meetings on the administrative level resulted in stipulations settling the case. The stipulations provided for the payment of the agreed taxes "plus statutory interest thereon." Petitioners contend that the Government breached its stipulations by asserting interest on the amount of taxes originally assessed and in assessing delinquency, not statutory interest as stipulated.

## Reasons for Granting the Writ

The reasons for granting the writ of certiorari follow:

### I

It has been the law from the earliest cases, among them, *Vogelstein,* 16 B.T.A. 947 (1929); *Ashton,* 28 B.T.A. 582 (1933); to what appears to be the latest case, *Elaine Yagoda,* 39 T.C. 170 (1962) aff'd 331 Fed. 2d 485, CA 2d (1964) that the burden of proof in transferee cases is on the Government to establish the value of the assets transferred. The Government did not carry the burden in this case. In *Ashton* such failure was considered fatal to the Government's cause. At page 586, citing from the *Vogelstein* case, the Board of Tax Appeals said:

> "We think that the proper interpretation of section 912 of the Revenue Act of 1926, added by section 602 of the Revenue Act of 1928, is that the burden of showing the extent of the liability of a transferee of property of a taxpayer is upon the Commissioner and that the Commissioner has not borne that burden by merely showing that the petitioner, by his own admissions, has received in liquidation the assets of a dissolved corporation, which itself may have been liable for a tax, without showing what value, if any, the assets in question had *at that time.* See Annie Temoyan, et al, Trustees, 16 B.T.A. 923." (Emphasis supplied.)

The Court concluded the *Ashton* case as follows at page 586:

> "There is no practical difference in the admission contained in the Vogelstein case and that of the

> petitioner. They both admit receiving assets from the transferor, but in neither case was there any proof or admission of the value of the assets received. *We think this is fatal,* as the amount of the liability of the transferee is fixed by the value of the assets received, and it is impossible for the Board to determine the amount of the liability unless there is proof or admission of the value of the assets received. In accord with the Vogelstein case, the motion of petitioner is sustained, and that of respondent is overruled." (Emphasis supplied.)

The *Yagoda* case is to the same effect.

In all these cases, the value of the assets were determined as of the time of transfer. The findings of the Commissioner of the Court below disclose that at the time of transfer the aggregate of the liabilities amounted to $6,993,528.63. The assets (later greatly reduced) amounted to $5,240,778.92 (Findings 9 and 16).

The Government in its brief made the following statement:

> "There are no exceptions to the Commissioner's Findings of Fact. All the material facts having been stipulated."

The Government's brief in the Court below confirms the petitioners' position that the Court unjustifiedly assessed the interest of $731,500.36. In a footnote it makes this statement:

> "Yet as they [petitioners herein] acknowledge the receipt of assets of $891,913.96 (Br. 8), it would seem that they would owe interest of at least the difference between that amount and the tax liability as finally determined of $790,683.12 or $101,230.84."

The Court of Claims however approved the assessment and collection of interest on the original assessments not on the small difference of $61,103.27 it arrived at.

## II

While the conflict of opinion between the decisions in the *Olympic Radio and Television, Inc.* v. *United States,* 124 CT. CL. 33, 108 F. Supp. 109 (1952), rev'd 349 U. S. 232 (1955) and *Lewyt Corp.* v. *Commissioner,* 215 F. 2d 518 (1954) aff'd in part and rev'd in part, 349 U. S. 237 (1955) remained unresolved, the determinations of the tax liabilities of the transferees for the two years involved in this case could not be determined (Finding 4). Justice dictates that the debtor should not be charged with interest on a debt until established and this is the law of the State of New York.

## III

Of importance in this case, indeed, in all transferee cases, is the effect and reach of this Court's decision in *Stern, Commissioner* v., 357 U. S. 39 (1958). The Court below relies on *Patterson* v. *Sims,* 281 F. 2d 577 (5th Circuit, 1960) followed by *Lowy* v. *Commissioner,* 35 T.C. 393 (1960) and *Stein* v. *Commissioner,* 37 T.C. 945 (1962) in approving the amount of interest asserted by the Government.

The District Court in the *Sims* case following *Voss* v. *Wiseman,* 234 Fed. (2d) 237 (C.A. 10, 1956) held that *Sims,* the transferee, was responsible for interest from the date of the deficiency assessment and notice thereof to the date of payment relying on the following excerpt from the *Voss* decision:

> "There is no liability on the part of the transferee in law or equity to pay the value of the assets until there has been a determination of the deficiency and notice thereof. 30 Am. Jur., Interest, §46. The transferee does not owe the tax deficiency and could not pay the value of the transferred assets

> until there has been a determination and notification of the taxpayer's deficiency."

The Government, as in the instant case, had assessed interest against the transferee for years long prior to notice and demand. The Circuit Court, in affirming said:

> "Since the Supreme Court in the *Stern* case, *supra*, held that Section 311 was a substitute for bringing a bill in equity, we may safely equate the filing of the creditor's bill under Alabama law with the notice of the transferee assessment under Section 311. Under Alabama law and under Section 311, Sims as transferee was liable for no addition to the value of the property received either by way of interest or by accounting for rents and profits prior to the date *on which he received notice of the assessment against him as transferee.*" (Emphasis supplied.)

New York law is to the same effect.

The Tax Court in the *Stein* case, *supra*, relied on by the Court of Claims included the following excerpt in its opinion but was omitted by the Court of Claims:

> "Under New York law, applicable herein, interest on a conveyance voidable because of constructive fraud runs from the date of demand by the creditor, but where actual fraud exists, interest runs from the date of the fraudulent conveyance. *MacIntyre* v. *State Bank of Albany*, 307 N. Y. 630, 120 N.E. 2d 832 (1954); *Doyle* v. *Levy*, 3 A.D. 2d 908, 162 N.Y.S. 2d 714 (1957) (both cases involving constructive fraud)."

This has been the law from the earliest cases. In *Ledyard* v. *Bull*, 119 N. Y. 62, 74 (1890) the Court held:

> "The general rule is that in the absence of an agreement to pay interest, it is implied by law as

> damages for not discharging a debt when it ought to be paid. The important practical inquiry, therefore, in each case in which interest is in question is, what is the date at which this legal duty to pay *as an absolute present duty arose?*" (Emphasis added.)

The legal duty to pay in the instant case did not occur until the Tax Court issued its decisions and the notices and demands were sent by the Government.

In *Hazell* v. *City of Long Beach,* 257 N. Y. 201, 203 (1931) the rule was tersely stated as follows:

> "The debt being established, interest from the date of demand (*Sweeney* v. *City of New York,* 173 N. Y. 414) follows as an incident."

The decisions of the Tax Court determining the deficiencies stipulated by the parties were filed on September 27, 1957, October 8, 1957 and October 9, 1957 (Finding 6). The notices and demands issued out of the office of the District Director on January 15, 1958 and July 1, 1958 (Finding 8).

## IV

The stipulations of the parties settling this case provided for the payment of the agreed taxes "plus statutory interest thereon" (Finding 6). The decisions of the Tax Court based on the stipulations used the same words. Petitioners contend that the Government could not assert (a) delinquency interest which it did and (b) assert statutory interest on taxes greater than the amount stipulated if the word "thereon" is to be given any effect.

Relying on the case of *Gould* v. *Gould,* 245 U. S. 151, 153 (1917) long and firmly established and based on the following excerpt from that decision:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

petitioners submit that the Court of Claims erred in its opinion as to the meaning of the four stipulated words above.

## Conclusion

For the reasons set forth above a writ of certiorari should be granted in order that the issues on which the case was tried may be determined with due regard to the stipulations agreed to by the petitioners and the Government.

Respectfully submitted,

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